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MEMORANDUM

DATE: January 15, 2010

TO: Richard Thomas and Brad Helland
Lower Duwamish Waterway Project Team, NWRO, Department of Ecology

FROM: Nels Johnson, AAG
Ecology Division

SUBJECT: **Liability for Contamination in Storm Water Sewer Pipe on the Jorgensen Forge Site**

You have asked me for advice regarding naming liable parties for contamination that has come to be located in a storm water sewer pipe that originates at King County Airport, collects storm water from West Marginal Way, crosses the Jorgensen Forge site/property and ends somewhere near the Lower Duwamish Waterway.

I. QUESTION PRESENTED

Who may be liable under the Model Toxics Control Act (MTCA) for contamination that has come to be located in a storm water sewer pipe (the Jorgensen pipe) that begins at King County Airport, crosses East Marginal Way and runs beneath the surface on property owned by the Jorgensen Forge Corporation (Jorgensen), and that apparently enters the Lower Duwamish Waterway (LDW) due to action of storm water from King County Airport and East Marginal Way?

II. SHORT ANSWER

Given the evidence available, there are good arguments that Jorgensen is liable for the contamination located in the pipe that crosses its property between King County Airport and the LDW. Depending on whether the property as a whole, or just the pipe, is viewed as the "facility," Jorgensen may be liable as an operator. Jorgensen is very likely liable as an owner, either by virtue of the contamination in the pipe, or due to contamination that may be entering the soil on its property from perforations or breaks in the pipe. King County and the city of Tukwila could be liable as owners or operators under various theories, but these theories are

legally untested and it is not known whether they are supported by the facts and history of the site.

III. FACTUAL BACKGROUND

The Jorgensen site lies between the east bank of the LDW on its west side, and East Marginal Way and the King County Airport to the east. It is bordered by the Boeing Plant 2 property to the north and the Boeing Isaacson property to the south. A buried 24 inch storm water pipe runs across the Jorgensen site from east to west. The pipe originates at the King County Airport, crosses East marginal Way and, after crossing the Jorgensen property, apparently empties into the LDW. The pipe has no visible outfall at the LDW, but presumably terminates in the soil behind the riprap that covers the LDW bank. The pipe is made of concrete for most of its length, but the end nearest the LDW is reportedly of corrugated metal. A video survey of the pipe indicated that the corrugated metal portion may be perforated. Storm water from King County Airport and East Marginal Way in Tukwila enters the pipe and flows in an easterly direction toward the LDW. The storm water is not known to exceed applicable water quality standards. Sampling within the pipe has revealed the presence of PCBs above MTCA cleanup levels. Storm water flowing through the pipe and causing the movement of PCBs within the pipe may be a source of contamination to the LDW sediments.

IV. DISCUSSION

The LDW is the focus of a joint cleanup effort by EPA and Ecology. PCBs in the LDW sediments are a major contaminant of concern. It has been recognized that it is necessary to accomplish source control in the uplands along the LDW before an effective cleanup of the LDW sediments is undertaken. Because contamination located in the Jorgensen pipe may be migrating to the LDW due to the flow of storm water through the pipe, Ecology must address this contamination as part of the LDW uplands source control effort. The three parties who have obvious associations with the pipe—Jorgensen, King County, and the city of Tukwila—have denied responsibility for the contamination located within the pipe below the surface of the Jorgensen property. This memo will discuss various theories under which these parties may be liable for clean up of the contamination in the Jorgensen pipe, and some of the defenses they have raised or would be likely to raise.

A. Jorgensen Forge

Jorgensen owns property between East Marginal Way and the LDW, bounded by Boeing Plant 2 to the north and the Boeing Isaacson property to the south. The Jorgensen pipe begins on King County property to the east of Jorgensen, crosses East Marginal Way, which is in the city of Tukwila, and then runs underground on the Jorgensen property from east to west, to a point near the LDW (the exact terminus of the pipe is not known, as the pipe does not extend out of the bank of the LDW, but apparently ends in the ground somewhere on the Jorgensen property).

There is no additional pipe or other type of connection to the Jorgensen pipe on the Jorgensen property, and there is no known input to the pipe from Jorgensen. Jorgensen acquired the property in 1992, at which time the pipe was already present. The contamination in the pipe is not known to have come from Jorgensen or its operations. There are circumstantial indications that the contamination came from Boeing's operations in the area, but there is no credible evidence of this at this time.

Under MTCA, a "facility" is "(a) any building, structure, installation, equipment, pipe or pipeline . . . or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located." RCW 70.105D.020(5). Those persons who generally will be liable with respect to a facility are owners or operators (either current or at the time of disposal or release of hazardous substances), "arrangers," and "transporters." RCW 70.105D.040(1).

1. Is Jorgensen an operator of a facility?

There is no evidence that Jorgensen arranged for disposal of, or transported the contamination in question under the definitions in MTCA. Accordingly, the most likely theory under which Jorgensen would be liable here is as an owner or operator. An "operator" of a facility is "any person . . . who exercises any control over the facility." RCW 70.105D.020(17)(a). According to Jorgensen, there is no connection or other type of input to the pipe at any point on the Jorgensen property. The pipe also reportedly predates Jorgensen's ownership. Jorgensen unquestionably exercises control over the property, so if the "facility" here consists in whole or in part of the property beyond the pipe, Jorgensen would appear to be an operator. However, there may be an argument that the "facility" consists only of the pipe, which only has inputs from off-property and may also discharge off-property. To the extent the contamination is confined to the pipe and did not come from Jorgensen, and Jorgensen has no control over the places where storm water enters the pipe and leaves the pipe, it could be argued that Jorgensen does not exercise any control over the facility, and is therefore not liable as an operator under MTCA. It is difficult to say whether a court would find Jorgensen to be an operator of the pipe for MTCA purposes under these facts, but in my opinion a party asserting this would face a substantial hurdle in convincing a court that such a finding would be fair.

2. Is Jorgensen an owner of a facility?

Jorgensen owns the property through which most of the length of the pipe travels. Jorgensen has argued that since the pipe predates its ownership, and nothing from the Jorgensen property enters the pipe, Jorgensen does not "own" the pipe and has no liability for contamination reaching the LDW by way of the pipe. While there may be an issue of fairness in holding Jorgensen liable as an owner (or operator) for the contamination in the pipe, "ownership liability," coupled with the right to seek contribution from others who may have contributed to the contamination, is a basic tenet of MTCA. *Pacific Sound Res. v. Burlington Northern Santa Fe Ry. Corp.*, 130 Wn. App.

926, 936 (2005); RCW 70.105D.080. Under MTCA, an owner is "any person with any ownership interest in the facility." RCW 70.105D.020(17). Current owners are liable under MTCA for contamination on their property, barring the availability of a MTCA defense. RCW 70.105D.040(1)(a); RCW 70.105D.020(17)(b)(i)–(iv); RCW 70.10D.040(3). While I can find no case law directly involving storm water pipes, as a general rule such features as buried tanks and pipes become fixtures of real property when installed, and are conveyed and owned as part of the realty, rather than as separate property. *See Parrish v. SW Wash. Prod. Credit Ass'n,* 41 Wn.2d 586 (1952); *Oden v. City of Seattle,* 72 Wn.2d 221 (1967). I can find no authority that stands for the proposition that a buried pipe is not a part of the property in which it is located, or the owner of the property not the owner of the pipe, in the absence of something like a separate easement in which the pipe is located. In light of the above, it seems likely that a court would find that Jorgensen is the owner of the portion of the pipe that is buried on its property.

3. Has there been a release of the hazardous substances in the pipe?

In addition to the requirement that Jorgensen be an owner or operator (or arranger or transporter) in order to be liable for the contamination in the pipe, another requirement for liability under MTCA is that there be a "release" or "threatened release" of hazardous substances into the environment. RCW 70.105D.040(2). If there are no leaks from the Jorgensen pipe on the Jorgensen property (which may not be the case, as discussed below), and no hazardous substance leaves the pipe until it enters the LDW, the question arises whether there has been a release or threatened release of hazardous substances at a facility for which Jorgensen could be liable under MTCA. In a federal district court case, the United States was held liable for a release under CERCLA when it disposed of hazardous waste into pipes that led directly to the environment ("there was no doubt that once the waste entered the pipes that the waste would enter the environment"). *Elf Atochem N. Am. v. United States,* 868 F. Supp. 707, 712 (E.D. Pa. 1994).[1] Based on this, it appears likely that the hazardous substance in the Jorgensen pipe has been released for purposes of MTCA liability. There is thus a viable argument that Jorgensen may be held liable for costs of remedial action to address the hazardous substance in the pipe as an owner of a facility where there has been a release.

Under the above analysis, Jorgensen might be held liable for the hazardous substances in the pipe even if they remain in the pipe until released to the LDW. In addition, however, there is evidence that the corrugated metal portion of the pipe, which is at the end closest to the LDW, is broken or perforated and storm water and contaminants from within the pipe may be flowing into the ground on the Jorgensen property before entering the LDW. If this is the case, then arguments about whether Jorgensen is an owner or operator of the pipe are less important, and

[1] Federal cases interpreting similar language in CERCLA are persuasive, albeit not controlling, authority. *Seattle City Light v. Dep't of Transp.,* 98 Wn. App. 165, 170 (1999).

Jorgensen may be named a Potentially Liable Person (PLP) under MTCA by virtue of the presence of hazardous substances in the soil and/or groundwater on its property.[2]

It is possible that Jorgensen, if named a PLP for contamination in or around the Jorgensen pipe, would attempt to raise a defense to liability under MTCA. The defenses provided in MTCA are the "plume clause," "third party," and "innocent purchaser" defenses. RCW 70.105D.020(17)(b)(iv), .040(3)(a)(iii), (b). Under the facts as I understand them, the plume clause defense would not likely be available to Jorgensen because it requires that contamination has come to be located on real property solely as the result of migration through groundwater from a source off the property. Movement of contamination through the pipe would presumably defeat this defense. The third party defense would be available only to the extent that Jorgensen could show that contamination is present on its site due to an act of a third party and that it exercised "utmost care." The innocent purchaser defense would be available only if Jorgensen could prove that it had no knowledge of the contamination at the time of purchase of the property and exercised due diligence in investigating the property before the purchase. At this time I do not have sufficient facts to fully assess the applicability of these defenses, but they should be kept in mind as we go forward.

B. King County and Tukwila

Jorgensen owns the property through which most of the length of the pipe runs, which includes the parts of the pipe where high levels of contamination have been located. Jorgensen is likely the owner of the pipe on its property, and may be an "operator" for MTCA purposes. Jorgensen is certainly an owner (and presumably on operator) of the property around the pipe. However, given that Jorgensen has no connection to the pipe, it is storm water from King County and Tukwila that is actually causing the contamination in the pipe to move, and appears to be causing any release from the pipe into the LDW (and possibly into the soil on the Jorgensen property).

The eastern end of the pipe is on property owned by King County, at the King County airport, which is the first point at which storm water enters the pipe. The pipe then crosses East Marginal Way, in the city of Tukwila. Storm water from East Marginal Way also enters the pipe. It is unclear what responsibility the city or county have for the pipe, or what jurisdiction they may exercise, under water quality law or county or municipal code. The city and/or county apparently violate state water quality law by causing or permitting the entry of polluting matter into waters of the state when storm water from the airport and East Marginal Way carries contamination down-pipe to the LDW. *See* RCW 90.48.080. However, the focus of this memo is on potential liability under MTCA.

[2] Jorgensen is currently under a MTCA agreed order to determine if the Jorgensen property is an ongoing source of contamination to sediments in the LDW. It is likely that this order provides adequate authority to require Jorgensen to investigate whether hazardous substances are present on its property outside of the pipe.

1. Is King County or Tukwila an owner under MTCA?

As with Jorgensen, it does not appear that the city or the county would be liable as an "arranger" or "transporter" under the facts here. It remains to be seen whether the city or county can be liable under MTCA as owners or operators of the pipe/facility. As discussed above, an owner under MTCA is "any person with any ownership interest in the facility." RCW 70.105D.020(17). It seems likely that, as with Jorgensen, the county would be found to own whatever portion of the pipe is on county property, and the city to own the portion of the pipe that lies under East Marginal Way, under the theory that a landowner will own the fixtures that come with its property. If the county and city own only the portions of the pipe that are on county and city property, they do not own the portion where contamination is located, and has likely been "released," and so are not owners of a facility under MTCA.

It is possible that there could be what is known as an "implied easement" across the Jorgensen property for the benefit of the city and county, which could mean they are owners of a contaminated site for purposes of MTCA. An easement is an interest in property and likely would satisfy the ownership requirement of MTCA. Creation of an implied easement requires a number of elements, including conveyance of part of a parcel and retention of part, and a new or pre-existing necessary usage between the two parcels after conveyance. 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* 79-121 (2d ed. 2004). I do not have the information about the history of the Jorgensen property that would be necessary to analyze whether there may be an implied easement here, and it is likely not going to be beneficial to pursue this line of research at this time.

2. Is King County or Tukwila an operator under MTCA?

The county and city could be operators of the pipe for MTCA purposes if they had authority to participate in or exercise control over the facility. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992); *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 127 (2006). It is not currently known when the contamination in the pipe came to be there, or whether there is any direct connection between the county or city and the contamination in the pipe. However, it could be argued that the movement of contamination in the pipe caused by storm water from the county and city constitutes a release. According to the court in *Taliesen*, mere passive migration of hazardous substances is not a release within the meaning of MTCA. *Taliesen*, 135 Wn. App. at 135. While it is possible that a court would see movement of contamination due to storm water flow as passive migration, it is also possible that a court might hold that migration is not passive where the flow is directed into a pipe and could be seen as a release.

In *Kaiser Aluminum v. Catellus*, a contractor was held to be liable as an operator, and to have disposed of contamination for purposes of CERCLA, when the contractor had authority to exercise control over a site and used heavy equipment to move contaminated soil and spread it

over uncontaminated areas. *Kaiser Aluminum,* 976 F.2d at 1343. It is far from clear how a court would compare storm water flow from the airport and East Marginal Way moving contamination in a pipe to a bulldozer or excavator spreading soil around, but there is at least a plausible analogy between the two scenarios. There is also the issue of control over the site. In *Bestfoods*, the U.S. Supreme Court stated that any person who operates a polluting facility is liable for costs of cleanup, whether it is the facility's owner, a parent corporation or business partner, or "even a saboteur who sneaks into the facility at night . . . ." *United States v. Bestfoods*, 524 U.S. 51, 65 (1998). Accordingly, there may be a theory that storm water from the airport and East Marginal Way constitute a trespass and a means by which the county and city exert control over the pipe. For this to succeed, it would likely also be necessary for a court to find that the storm water is not following a "natural drainage way." This finding seems likely under the holding in *King County v. Boeing Company.* In that case, the Supreme Court of Washington held that drainage straight west from Boeing Field to Slip 5 in the Duwamish did not follow a natural drainage way, because the drainage in the area had been altered by creation of the LDW and removal of the Duwamish River's original channel. *King Cy. v. Boeing Co.,* 62 Wn.2d 545, 552 (1963).

Under either an owner or operator liability theory, establishing PLP status for the city or county seems like an uncertain prospect at this point. As we have seen, there are theories that could be pursued and developed, but they would to some extent require travelling on new legal paths, and it is uncertain whether they would be favored by courts. As discussed above, Jorgensen is probably the party for whom the clearest case for liability under MTCA may be made under the facts in this case.

V. CONCLUSION

Depending on whether the property as a whole, or just the pipe, is viewed as the "facility," Jorgensen may be liable as an operator. Jorgensen is very likely liable as an owner, either by virtue of the contamination in the pipe, or due to contamination that may be entering the soil on its property from perforations or breaks in the pipe. King County and the city of Tukwila could be liable as owners or operators under various theories, but these theories are legally untested and it is not known whether they are supported by the facts and history of the site.

I hope this information will be helpful. Please do not hesitate to contact me if you have any further questions, or wish to discuss any aspect of this matter at greater length.

NJ:tlt